STATE OF MICHIGAN

COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

GLEN PATRICK ANTHONY,

Defendant-Appellant.

UNPUBLISHED
June 11, 2013

No. 300212
Wayne Circuit Court
LC No. 10-000980-FC

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

GLEN PATRICK ANTHONY,

Defendant-Appellant.

No. 300264
Wayne Circuit Court
LC No. 09-020264-FC

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

GLEN PATRICK ANTHONY,

Defendant-Appellant.

No. 308204
Wayne Circuit Court
LC No. 09-019855-FC

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

GLEN PATRICK ANTHONY,

No. 308205
Wayne Circuit Court
LC No. 09-019858-FC

Defendant-Appellant.

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

GLEN PATRICK ANTHONY,

No. 308212
Wayne Circuit Court
LC No. 09-019866-FC

Defendant-Appellant.

Before: K. F. KELLY, P.J., and SHAPIRO and RONAYNE KRAUS, JJ.

PER CURIAM.

In this consolidated appeal, defendant appeals as of right from various convictions that were the result of two separate trials. In the first trial, the jury found defendant guilty of kidnapping, four counts of first-degree criminal sexual conduct (CSC), felon-in-possession, and felony-firearm as to each of the two victims MC (09-020264-FC) and ND (10-000980-FC). In each case, defendant was sentenced to life imprisonment for the kidnapping conviction, 70 to 120 years' imprisonment for each of the first-degree CSC convictions, 2 to 5 years' imprisonment for the felon in possession conviction, and 2 years' imprisonment for the felony-firearm convictions. The judgment of sentence in case 09-020264-FC provides that the sentence is consecutive to case 10-000980-FC. Similarly, the judgment of sentence in 10-000980-FC provides that the sentence is consecutive to case 09-020264-FC.

Following the second trial, the jury found defendant guilty of armed robbery, kidnapping, five counts of first-degree CSC, one count of second-degree CSC, felon-in-possession, and felony-firearm as to TC (09-019858-FC). It also found defendant guilty of armed robbery of CC (09-019858-FC). The jury found defendant guilty of armed robbery, kidnapping, three counts of first-degree CSC, felon-in-possession, and felony-firearm as to MH (09-019866-FC). Finally, the jury found defendant guilty of kidnapping and assault with intent to do great bodily harm less than murder as to AL (09-019855-FC). As to TC (09-019858-FC), defendant was sentenced to two life sentences for each of the armed robbery convictions (victims TC and CC), life imprisonment for the kidnapping conviction, 70 to 120 years for each of the five first-degree CSC convictions, 20 to 30 years' imprisonment for the second-degree CSC conviction, 2 to 5 years' imprisonment for the felon-in-possession conviction, and 2 years' imprisonment for the felony-firearm conviction. As to MH (09-019866-FC), defendant was sentenced to life imprisonment for the armed robbery conviction, life imprisonment for the kidnapping conviction, 70 to 120 years for each of the three first-degree CSC convictions, 2 to 5 years' imprisonment for the felon-in-possession conviction, and 2 years' imprisonment for the felony-firearm conviction. As to AL (09-019855-FC), defendant was sentenced to 40 to 70 years' imprisonment for the kidnapping conviction, 5 to 10 years' imprisonment for the assault with

intent to do great bodily harm less than murder conviction, and 6 months to 1 year in jail for aggravated assault.[1] The trial court added that "each of these sentences are to be consecutive, and they're consecutive with each other. They're also consecutive with the sentences that were imposed in the two previous cases that related to this matter." Defendant was also ordered to pay $130 to the Crime Victims Fund.

We affirm defendant's convictions, but remand for further proceedings to correct a number of sentencing errors. Defendant was never convicted of aggravated assault and the trial court erred in sentencing defendant for a crime for which he was not convicted. Additionally, the trial court erred in ordering lifetime electronic monitoring in AL's case because defendant was not convicted of CSC. Finally, the trial court erred in ordering the sentences in these cases to run consecutively to each other absent statutory authority to do so.

I. BASIC FACTS

Over the course of a few weeks in the summer of 2009, defendant preyed upon young black women on the eastside of Detroit.

At approximately 2:00 a.m. on June 22, 2009, nineteen-year-old MC was walking with her aunt and her aunt's girlfriend. A man was walking towards them. As they were about to pass one another, the man grabbed MC, pointed a gun at the aunt and friend and ordered them to walk away. He walked MC down the block to a car where he opened the trunk with keys and ordered her inside the trunk. The man drove with MC in the trunk and after the car came to a stop, he told MC that he was going to let her out of the trunk, but ordered her to keep her head down and eyes closed. The man used a key to gain entry to a house. He guided MC down to the basement where he ordered her to take her clothes off. He then walked her upstairs to a bedroom and ordered her to lie down on the bed. "[H]e starts telling me again the reason why he had took me was because my family had owed him some money and since they didn't pay him that he was going to take it from me." The man put a cloth over her eyes. He penetrated her vagina and anus and ordered her to perform oral sex on him. He also placed what felt like a metal foreign object in her vagina. Throughout the encounter, the man would periodically "wash" MC with a towel. The man eventually ordered MC to get dressed. He walked her to the car where he ordered her back into the trunk. When the car came to a stop, the man told MC that he would take off the blindfold and she was to walk up the street and not look back. There was no identifiable evidence obtained from MC's rape kit; however, clothing fibers taken from defendant's car were similar to those that MC had been wearing.

At approximately 1:00 a.m. on June 25, 2009, sixteen-year-old ND was walking home with a friend when they heard some noise in the bushes. A man jumped out with a silver handgun, pointed it at ND's companion and told him to run. He dragged ND to his car where he forced her into the trunk. After driving for approximately 15 minutes, the man stood outside the trunk and told ND that he was going to let her out of the trunk and blindfold her and she was not

[1] As will be discussed below, defendant was not convicted of aggravated assault and was improperly sentenced.

to look at him. He walked ND up some stairs into a home where he ordered her to undress. He then penetrated her vaginally, anally, and orally. He also licked her breasts. When ND asked why she was being assaulted, the man explained "your mom owes me a debt and you're going to pay for it." After the assault, the man led ND to the bathroom where he used a wet towel to "wash her up." The man returned ND's clothes, but kept a dollar, a bridge card, and a pack of Kool- Aid. He walked ND back to his car and placed her in the passenger seat that was fully reclined. The man drove her to the area in which she was taken and ordered her to get out of the car and not look back. Although ND was unable to choose a suspect from a live lineup that included defendant, DNA from breast swabs in ND's rape kit were linked to defendant.

At approximately 1:00 a.m. on July 5, 2009, nineteen-year-old TC and her friend CC were walking to CC's house when they saw a man walking on the other side of a white van on the street corner. He came around the van and told the women to keep their heads down. TC positively identified defendant as the man. Defendant ordered CC to empty her pockets and start walking down the street. He placed what TC believed to be a gun against her head and walked her to a car where he ordered her inside the trunk. When the car came to a stop, defendant told TC that he was going to open the trunk and warned her to keep her head down. He walked her up some stairs into a home where he ordered her to take her clothes off. Defendant covered her face with a towel and engaged in digital, vaginal, anal, and oral sex. He also penetrated TC with the tip of a gun and licked her breasts. Defendant explained that he was doing it because TC's family owed him money. Throughout the assault, defendant would periodically walk TC to the bathroom and wash her with a sponge, soap and water. Defendant ordered TC to redress and then blindfolded her. He led her out of the house to the front passenger's seat of a car that was fully reclined. Defendant dropped her off in the vicinity of where she was originally taken, telling her not to turn around and look at him. TC equivocated during a live lineup. She was confident that the perpetrator was in position six, but she was too nervous and scared to positively identify him at the time. As with ND, breast swabs from TC's rape kit was matched to defendant's DNA.

At approximately midnight on July 6, 2009, eighteen-year-old MH was walking home alone from a gas station where she had just bought some snacks. A man was approaching her from the opposite direction, asking questions like "where are you going," "do you have a boyfriend." After they passed, MH could feel someone tap her on the back. She turned and saw the man with a gun. He ordered her to keep her head down and walked her to a car. He opened the trunk with a key and ordered MH inside. MH lost a cosmetic contact lens in the trunk because she had been crying and rubbing her eyes. When the car stopped, the man told MH to keep looking down. He guided her up some stairs and into a home where he ordered her to stand against a wall and undress. The man gave MH a mask to put on. He penetrated MH vaginally, anally, and orally. He explained that he was doing it because "my mom owed him money." The man provided MH with a soapy wet rag for her to wash herself. He helped her put her clothes back on and then led her out to the car, placing her in the fully reclined passenger front seat. The man drove MH to the area in which she was originally taken and ordered her to get out and not look back. At the live lineup, MH left the viewing room, stating that she did not know if her attacker was in the array. However, after she left the room and felt more comfortable, MH positively identified defendant from the lineup. Additionally, a cosmetic contact lens from the trunk of defendant's car matched MH's DNA.

At approximately 2:00 a.m. on July 12, 2009, twenty-year-old AL was driving home from a restaurant when her car was rear-ended. A man approached her driver's side window, asking if she was all right and whether there was damage to her car. AL positively identified defendant as the man. AL looked down at the cell phone on her lap when she was suddenly grabbed by the back of the head and dragged out of her car. Defendant dragged AL to another car and ordered "B****, get in the trunk." AL struggled with defendant. When defendant tried to lift her into the trunk she fell and was able to escape. AL needed a staple in her scalp as a result of the incident. AL positively and unequivocally identified defendant during a live lineup.

Defendant was convicted and sentenced as outline above. He now appeals as of right.

II. SUGGESTIVE IDENTIFICATION

Defendant argues that the photo array presented to MC was unduly suggestive because defendant was the only subject whose tank top had black stripes on the shoulders. Defendant also argues that officer-in-charge, Jose Ortiz, told MC whom to choose from the photo array and, therefore, the live lineup, which Ortiz also conducted for the four other victims, was suspect.

We review for clear error a trial court's decision to admit identification evidence. Clear error exists when the reviewing court is left with a definite and firm conviction that a mistake was made. *People v Kurylczyk*, 443 Mich 289, 303; 505 NW2d 528 (1993).

"In order to sustain a due process challenge, a defendant must show that the pretrial identification procedure was so suggestive in light of the totality of the circumstances that it led to a substantial likelihood of misidentification. If the trial court finds that the pretrial procedure was impermissibly suggestive, testimony concerning that identification is inadmissible at trial." *Kurylczyk*, 443 Mich at 303-304 (internal citations omitted). Whether an identification procedure was impermissibly suggestive is evaluated in light of the totality of the circumstances. *Id.* at 302.

> Generally, the photo spread is not suggestive as long as it contains some photographs that are fairly representative of the defendant's physical features and thus sufficient to reasonably test the identification. Thus, differences in the composition of photographs, in the physical characteristics of the individuals photographed, *or in the clothing worn by a defendant* and the others pictured in a photographic lineup have been found not to render a lineup impermissibly suggestive. [*Id.* at 304-305 (footnotes and internal quotation marks omitted) (emphasis added).]

Here, the trial court found:

> THE COURT: Okay. I don't think there's any need to have testimony at this point. I have reviewed the photo lineup and as the prosecutor has indicated, I agree. I think it's one of the best photo arrays that I've seen. I think that the Defendants are well matched in terms of the size, the skin tone, facial hair, the fact that they're bald. And the fact that the Defendant happened to have a tank top that had a stripe on it, honestly, I would never have even picked that out myself. I just think it's beyond the realm of reason to believe that somehow the

> police are intentionally trying to call attention to the Defendant by virtue of the fact that there is a dark part of his tank top that the others don't have and I don't think there's any indication in the record from the victim, who provided information regarding what she looked at and what she found, and on that basis I don't think that there was anything unfair or unreasonable about the photo array and I will therefore deny Defendant's motion to suppress the photo lineup on the basis of the Wade Motion.

The trial court properly declined to hold an evidentiary hearing because it was apparent that defendant's challenge was insufficient to raise a constitutional infirmity and failed to substantiate the allegations of infirmity with factual support. *People v Johnson*, 202 Mich App 281, 285; 508 NW2d 509 (1993). It is obvious that the photo array "reveals no discrepancy among the physical characteristics of the . . . participants so readily apparent as to form a basis for the exclusion of the identification testimony." *People v Hornsby*, 251 Mich App 462, 466; 650 NW2d 700 (2002). A review of the actual photo array reveals nothing suggestive. All six participants were black men. All were bald. All had hints of facial hair. And, aside from a black stripe on defendant's tank top, all wore identical clothing. Defendant's claim that the stripe was unduly suggestive is without merit.

However, defendant goes on to argue that, even if the photo array itself was not unduly suggestive, Ortiz's conduct in this case calls into question *all* of the witnesses' identification. Defendant points to the fact that MC testified that Ortiz told her whom to choose, calling into question all of the other witnesses' identification testimony.

A hearing was held on defendant's motion that the live lineup was unduly suggestive.[2] Defense counsel explained that the other individuals who were involved in the lineup "were threatening him because they knew what he'd been charged with . . .and it was while this was going on that these witnesses are there trying to pick him out and the other people in the lineup, basically identified him as the subject of the lineup and threatened him because they'd been told that he's an alleged serial rapist."

TC testified that she went to the Wayne County Jail on July 25, 2009 to view a lineup. TC was in a room with Ortiz and a lawyer. She was advised to "look and pick out the person that . . .raped me." TC denied that anyone told her whether the person who assaulted her was actually in the lineup; neither of them told her to pick a particular person. TC observed that the individuals participating in the lineup were "just standing there"; there did not appear to be any talking or fighting among themselves. TC identified "number six" as the man who attacked her and told Ortiz that "it looked like him." She was sure it was him, but may have hesitated "[b]ecause I was nervous and really didn't know what to say" but "I knew who he was when I seen him." TC asked whether the participants could say something. Once the participants spoke, it further confirmed TC's belief that "number six" was her assailant. However, she never told Ortiz that she was "sure" it was "number six."

[2] Defendant does not argue on appeal that the live lineup was unduly suggestive.

AL testified that she also viewed the lineup. AL was not told that the person who assaulted her was definitely included in the lineup. Ortiz did not tell AL to focus on any one person in particular. He simply told her to "just take my time and if I see somebody that, that looked like the person, tell him." An attorney was also in the room. The individuals in the lineup "was just standing there with their arms, I think, behind their back." They did not appear to be talking to one another or focusing on a particular individual. AL looked at the individuals and started to cry because she "always remember a face." She chose defendant from the last position of the lineup. AL chose defendant because he was the one who assaulted her, not because she was told whom to choose. AL never chose an individual from the photo array, but was "100 percent" certain that the man she chose at the lineup was her assailant.

MH testified that she also attended a live lineup. Ortiz did not tell MH that police had a person that they wanted her to identify; she was not told whom to identify. "I was to pick one if I saw the person." The individuals in the lineup were standing in a line with their hands at their sides. They did not appear to be talking to one another. MH felt scared; she feared that the men could see her even though she had been assured that they could not. She first told the officers that she was not sure if she could identify her assailant; however, once MH left the room, she identified defendant. Defendant was in position number two at that point.

Officer Jose Ortiz testified that he was the officer-in-charge of the cases. Defendant was identified as a possible suspect after a DNA match was made from TC's rape kit. Defendant was arrested and taken to the Wayne County Jail for a live lineup. Ortiz notified the on-call attorney, Ms. Bradfield, who voiced no objection to the array. Defendant was number six in the array for TC and AL, and was number two in the array for MH. Defendant changed positions after complaining that the inmates were "giving him a hard time;" he chose to move to be farther away from them.

Ortiz testified that MH went first. She was "crying, shaking, she was real distraught" and did not want to go in the room. She immediately paced back and forth. Ortiz denied suggesting any of the individuals to MH. None of the individuals in the lineup acted in such a way as to have defendant stand out. MH said, "I'm not sure." "She stormed out of the room, she's crying, I walked behind her and she's walking midway trying, trying to get back to the front, to the lobby area and she's midway there and she turned around and says it was number two." Defendant was in position two. Ortiz went back into the room and told the attorney what happened and then generated a report as to MH's statement.

Ortiz testified that TC was next. TC was also crying and pacing. She asked if the lineup participants could say a certain phrase. None of the lineup participants were moving, talking or fighting. After approximately four minutes, TC, who had been focused on defendant in the sixth position said, "I'm not sure, possibly number six."

Ortiz testified that AL viewed the lineup next. None of the lineup participants were moving, talking or fighting. "She came in there, she took a few minutes, looked at each one, and then she said it was number six." AL was unequivocal and added, "he snatched me out the car and tried to put me in the trunk." Defendant was in position six at the time.

Ortiz testified that ND viewed a live lineup, but was unable to identify anyone. Officers were unable to locate MC and she did not participate in the live lineup. Thereafter, defendant refused to participate any further in the lineups.

Daphne Bradfield testified that she was the on-call attorney for the lineup. The lineup participants were all wearing jail "jumpsuits" and were approximately the same height. "Nothing stood out" about the differences in their appearances in terms of hair, facial hair, scars, tattoos, or other physical characteristics. Bradfield did not observe any of the participants yelling at or grabbing defendant. Bradfield signed off on all of the identification sheets and had no objections.

Defendant testified that he initially chose to be in position two. The other individuals "was saying that I was the eastside rapist." "The guy next to me was talking to me telling me they standing over there by us, they standing, that's what he kept saying. And the other guys was like, man, this is some bulls***, this guy, man, and all this whole threat, he talking about you the eastside rapist, why I'm doing this, all that, this was taken place while people was in the lineup." The individuals were "threatening me, talking about how they should whoop me and all this type of stuff." Defendant complained to Ortiz, who told defendant to choose another position in the lineup. "I had to stay; that's what I felt like. I was made to stay in there."

The trial court concluded that "the lineups were not unconstitutionally suggestive" and denied defendant's motion to suppress.

However, at a later hearing on June 24, 2010, the prosecutor made the trial court aware of a new development:

> [A]s a matter of course, we do pretrial interviews with all of our victims. A week ago Friday, we spoke with [TC] and [AL]. Yesterday, we had scheduled [MC] as well as [ND]. And tomorrow is [MH].
>
> When we brought [MC] in yesterday, it was myself, and Miss Abdelnour as well as two interns and our victim advocate, Bobby Dickson. We were going through her testimony and talking about the incident, when it came to my question in regards to the photo lineup, because as the Court will recall on July 25th, 2009, there were live lineups conducted with the other complainants.
>
> The defendant refused to participate anymore, further live lineups. And [MC] could not make it for a live lineup, so she was presented with a photo lineup on July 28th. Three days later.
>
> When I got to the photo lineup, I asked her 'did you pick anybody out?' and she said, 'Yes, I picked out someone.' I said, 'do you happen to recall what number the person was in the photo array that you picked out?' She immediately responded, 'Yes, I picked out number five.'
>
> I then asked her, 'Did anybody tell you who to pick out?' And she hesitated. She looked at the victim advocate. She looked back at us and she said, 'You told me that I have to be truthful, right?' I said, 'Yes, you always have to be

one hundred percent truthful.' She said, 'Well, when we got to the precinct, Jacquetta and I were together and they took me immediately in the back. Officer Ortiz took me in the back into an office. And he told me, he asked me would I be able to pick anybody out. And I told him at that point that I didn't think that I would be able to. And he told me, 'well we got the right guy. So don't worry about that. We have his DNA. If you get confused, it's number five.'

So when I went in, then she said, we went into the, to do the lineup. There was an attorney present. She said, 'I looked at the lineup and I picked out number five.'

Well, why did you pick out number five? Did you pick out number five because Ortiz told you to pick him out? Or did you pick him out because you know him to be the person that had done this? And she said, 'Well to be honest,' she's like I wasn't sure. He looked familiar. His eyes, something about his eyes rang true. But I picked him out because that's who I was told to pick out.'

I said, okay. We moved on with the rest of the interview and went over the rest of the case. I had the interns leave, and went back to the lineup again just to make sure that what she's telling me was exactly what I thought it was. And it was indeed the same.

At that point, defense counsel moved to suppress all identification testimony on the basis that "I believe this clouds everything that Officer Ortiz has done, in terms of the show ups." While the prosecutor conceded that any identification testimony from Carr had to be suppressed, but he did not believe that the other victims' identifications were tainted. The trial court denied defendant's motion:

Obviously I was here and heard and saw the witnesses testify in the Wade hearing, with respect to their identifications, including the testimony of Officer Ortiz in this matter.

It's my belief that those individuals provided testimony that was credible. And that, in fact, you know, that there were lineups done in which some of the complainants were unable to identify the defendant.

So, I think if there had been a pattern of abuse with respect to Officer Ortiz where he was attempting to tip off each of the individuals as to the correct person to pick out, I don't think we would have had the array of responses that we had with respect to these various complainants.

I don't know what may have motivated Officer Ortiz with respect to [MC] under these circumstances, or, in fact, if she was telling the truth originally and not telling the truth now, or what not. But it's clear to me that her identification is not admissible, in terms of either the photo lineup or an in court identification.

And with respect to the other complainants who have made identification, I am going to, based upon the prior Wade hearing that occurred, I am going to

allow them to continue to be able to provide identification to the extent that they can in the trial in this matter.

So I am going to allow the suppression of the identification with respect to [MC]. But not with respect to the other individuals . . .

At the second trial, defense counsel renewed her objection to the identification testimony based on the fact that a witness "told us that Officer Ortiz had told her to pick a certain person out." The trial court assured counsel that "the record is protected on behalf of" defendant, but that "the same ruling applies here."

On appeal, defendant does not argue that the live lineup was unduly suggestive; instead, he argues that the suggestive photo array, coupled with Ortiz's behavior, resulted in the "real likelihood" of improper in-court identifications. However, as previously noted, there was nothing at all suggestive about the photo array. Additionally, MC was the only victim to choose defendant from a photo array because she was unavailable when the live lineup was held. The record does not support defendant's contention that Ortiz coached any of the other witnesses. Had he done so, there would have been four unequivocal identifications at the lineup. Instead, only AL definitively stated that defendant was her assailant; she was the only witness to sign the identification sheet at the lineup. None of the other witnesses signed the sheet because they equivocated with statements such as "it looks like him" or "I think it might be him." Ortiz prepared a separate report as to MH after she identified defendant once she was out of the room. Counsel was present during the lineup. She had no objection to the composition and did not testify that Ortiz sought to influence the witnesses. There is simply no support for defendant's contention that Ortiz coached the other witnesses. Accordingly, the trial court did not err in failing to suppress identification evidence.

III. "OTHER ACTS" EVIDENCE

Defendant argues that the trial court violated his due process rights by admitting unfairly prejudicial evidence of an alleged attempted abduction that did not involve CSC. Defendant further argues that the similar other acts evidence of all five victims in both trial resulted in unfair prejudice.

"A trial court's discretionary decisions concerning whether to admit or exclude evidence will not be disturbed absent an abuse of that discretion. When the decision involves a preliminary question of law[,] however, such as whether a rule of evidence precludes admission, we review the question de novo." *People v Mardlin*, 487 Mich 609, 614; 790 NW2d 607 (2010) (internal quotations and footnotes omitted).

On March 15, 2010, a hearing was held on the prosecutor's motion to use MRE 404(b) evidence to show common plan or scheme, as well as identity. The prosecutor argued that "there are five women in this case who are essentially saying that the defendant did certain things to them in a common plan or system or scheme that he uses in sexually assaulting these women." Defense counsel responded that "if there was ever a case where the use of 404(b) evidence would cause . . . unfair prejudice, this is the case. . . .I can see a jury hearing these five women testify.

Testify to these various acts, and testify to the actions as they occurred. And making one decision, and one decision only. He must have done it."

The trial court concluded:

> On the basis of my review of the motion and the law as well as argument here today, I am going to grant the People's motion and allow the 404(b) evidence of other acts to be offered into evidence at the time of trial in this matter.
>
> I do think the cautionary instruction that can be given to a jury will be sufficient to allow them to understand what the evidence is being offered for. And that they can conclude, based upon that, that they're not to infer that because these other acts have been introduced into evidence that he may have done something wrong in the past and therefore he did something wrong in the incident for which he is on trial. But rather to view them for the purpose of proving defendant's characteristic, scheme, plan or system.
>
> And I think based upon the information provided there is sufficient basis to show that there was very similar scheme, plans or system that was used in each of these incidents.

During the first trial, defense counsel renewed her objection to the admission of 404(b) evidence. The following discussion took place:

> MS. REED: Your Honor, I would just renew my objection to the 404(b) witnesses. I know the prosecutor said they showed common plan and scheme, but I think so far, what they've presented between [TC] and [ND] are not similar, in terms of the injuries inflicted. We went through the reports with the S[AFE] people. One woman had numerous notes, pressure point injuries on the body, the other didn't. I think that that does not show a common plan, scheme or motive.
>
> THE COURT: Okay. I disagree. I think, in fact, the testimony of [TC] and [ND], at least for me, emphasized that the ruling on the 404(b) was correct, in terms of the testimony regarding the specifics of the manner in which they were abducted, the manner in which they were transported in the trunk of a car, the manner in which they were brought to a home, and the testimony that they provided regarding the manner in which they were told to disrobe, and those kinds of things are all, I think clearly indicative of – based upon the testimony of these two witnesses thus far, common plan or scheme. So, I am going to, as I said before, allow the 404(b).
>
> And I think I also mentioned sidebar that I believe that the suggestion to read this criminal jury instruction 4.11 at this time is probably a good idea, and one that I'm going to do. Because it emphasizes for the jury that these additional witnesses that they're seeing, they're not going [to] be making a decision with respect to those acts and what their role in this proceeding is.

The trial court then gave the jury a limiting instruction.

Defense counsel later renewed the objection, arguing that such evidence "sort of allows the jury to say, you know, there's no I.D. in this one, and there's no I.D. in the one that he's charged with, and, you know, really not sure, there's some DNA, but we have all these others, so therefore, he must be guilty." The trial court denied the motion, but indicated that it would give additional jury instructions as to the use of evidence, especially regarding the rape kit for [TC]. It again gave the jury a limiting instruction. The trial court's final instructions during the first trial also included a limiting instruction.

At the second trial, the trial court gave the jury a liming instruction on at least three occasions.

The repeated instructions at both trials emphasized that the jury could use the "other acts" evidence for the limited purpose of establishing identity or to show common scheme, plan or pattern; the jury could not use the evidence to prove defendant's character to show that he acted in conformity therewith.

We conclude that the trial court did not abuse its discretion in allowing the other acts evidence to show identity and common scheme, plan or pattern. MCL 768.27 provides:

> In any criminal case where the defendant's motive, intent, the absence of, mistake or accident on his part, or the defendant's scheme, plan or system in doing an act, is material, any like acts or other acts of the defendant which may tend to show his motive, intent, the absence of, mistake or accident on his part, or the defendant's scheme, plan or system in doing the act, in question, may be proved, whether they are contemporaneous with or prior or subsequent thereto; notwithstanding that such proof may show or tend to show the commission of another or prior or subsequent crime by the defendant.

Additionally, MRE 404(b)(1) provides:

> Evidence of other crimes, wrongs, or acts is not admissible to prove the character of a person in order to show action in conformity therewith. It may, however, be admissible for other purposes, such as proof of motive, opportunity, intent, preparation, scheme, plan, or system in doing an act, knowledge, identity, or absence of mistake or accident when the same is material, whether such other crimes, wrongs, or acts are contemporaneous with, or prior or subsequent to the conduct at issue in the case.

In order for other acts evidence to be admissible: 1) it must be offered for a proper purpose; 2) it must be relevant; 3) the probative value of the evidence may not be substantially outweighed by unfair prejudice; and, 4) that the trial court may, upon request, provide a limiting instruction to the jury. *People v VanderVliet*, 444 Mich 52, 55; 508 NW2d 114 (1993) amended 445 Mich 1205 (1994).

"Evidence relevant to a noncharacter purpose is admissible under MRE 404(b) *even if* it also reflects on a defendant's character. Evidence is *inadmissible* under this rule only if it is relevant solely to the defendant's character or criminal propensity. Stated another way, the rule is not exclusionary, but is inclusionary, because it provides a nonexhaustive list of reasons to

properly admit evidence that may nonetheless also give rise to an inference about the defendant's character." *Mardlin*, 487 Mich at 615 (emphasis in original). "Relevant evidence" is "evidence having any tendency to make the existence of any fact that is of consequence to the determination of the action more probable or less probable than it would be without the evidence." MRE 401. Evidence that is otherwise relevant "may be excluded if its probative value is substantially outweighed by the danger of unfair prejudice, confusion of the issues, or misleading the jury, or by considerations of undue delay, waste of time, or needless presentation of cumulative evidence." MRE 403; *People v Mann*, 288 Mich App 114, 119 n 12; 792 NW2d 53 (2010).

Here, evidence related to defendant's bad acts with each of the five victims was admitted at both trials to prove identity as well as his plan, scheme, or system in committing the assaults. When introduced to establish identity, the prosecutor bears the heavy burden "to show that the manner in which the crime charged and the other crimes were committed was marked with special characteristics so uncommon, peculiar and distinctive as to lead compellingly to the conclusion that all were the handiwork of the defendant because all bore his distinctive style or 'touch'." *People v Golochowicz*, 413 Mich 298, 325; 319 NW2d 518 (1982). Additionally, "evidence of similar misconduct is logically relevant to show that the charged act occurred where the uncharged misconduct and the charged offense are sufficiently similar to support an inference that they are manifestations of a common plan, scheme, or system. " *People v Sabin (After Remand)*, 463 Mich 43, 63; 614 NW2d 888 (2000). "Unlike evidence of uncharged acts used to prove identity, the plan need not be unusual or distinctive; it need only exist to support the inference that the defendant employed that plan in committing the charged offense." *Id* at 63; 614 NW2d 888 (2000) quoting with approval *People v Ewoldt*, 867 P 2d 757 (California, 1994).

The other acts evidence in these cases was properly admitted to prove identity as well as defendant's plan, scheme, or system in committing the assaults. The crimes against [MC], [ND], [TC] and [MH] were "marked with special characteristics so uncommon, peculiar and distinctive as to lead compellingly to the conclusion that all were the handiwork of defendant because all bore his distinctive style or 'touch'." *Golochowicz*, 413 Mich at 325. All of these young, black women were approached in the early morning hours as they were walking on the eastside of Detroit. Defendant used a handgun to threaten the girls and ordered them into the trunk of his car. Defendant took the girls to a home where he ordered them to undress, covered their eyes, and required them to perform sexual acts that were similar in nature – involving vaginal, anal and oral penetration, as well as penetration with a foreign object. Defendant explained to each girl that her family owed him money and that he was essentially collecting on a debt. Defendant also washed each of the girls with a wet towel. After the assaults were complete, defendant ordered the girls to dress and then placed them back into his car where he drove them to a location in close proximity to where they were originally taken. Although there were some variations from assault to assault, these common characteristics indicate a peculiar and distinctive style identifying defendant as the perpetrator. Additionally, the evidence tended to show "manifestation of a common plan, scheme or system." *Sabin*, 463 Mich at 63. The attacks took place over the span of a few short weeks in the summer of 2009. Defendant utilized the same method for each of the attacks, specifically targeting young black women on the eastside of Detroit.

While it is true that the facts related to AL are markedly different because she was able to escape prior to being placed in defendant's trunk, the evidence from her incident was relevant because it tended to prove a pattern of conduct. In contrast to identity, prior bad acts offered to prove a pattern or practice are subject to a lower requirement of distinction or uniqueness, and acts offered to prove intent require even a lesser degree of similarity. See *People v Smith*, 282 Mich App 191, 195; 772 NW2d 428 (2009) ("A high degree of similarity is required [to show a pattern of conduct]—more than is needed to prove intent, but less than is required to prove identity—but the plan itself need not be unusual or distinctive.") AL was rear-ended by defendant, who then reached in and grabbed her from her car and pulled her to the trunk of his own car. Love was able to escape and positively identified defendant during a live lineup and also at the two trials.

We further conclude that the probative value of the other acts evidence in both trials was not outweighed by the danger of unfair prejudice. MRE 403 provides that relevant evidence "may be excluded if the probative value is substantially outweighed by the danger of unfair prejudice, confusion of the issues, or misleading the jury, or by considerations of undue delay, waste of time, or needless presentation of cumulative evidence." Although evidence of other instances of criminal sexual conduct is prejudicial, the relevance of the other acts evidence was established "through similarities between the charged and uncharged acts, rather than on defendant's character, as shown by the uncharged act." *Sabin*, 463 Mich at 63-64 n 10. Additionally, as demonstrated above, the trial court took great pains to properly instruct the juries in both trials as to the limited nature of the evidence. Therefore, any danger of prejudice was minimized by the trial court's several instructions to the jury that it could not use the evidence to conclude that defendant was a bad person or that he had the propensity to commit the charged crimes. Jurors are presumed to follow their instructions. *People v Abraham*, 256 Mich App 265, 279; 662 NW2d 836 (2003). Finally, "[c]lose questions arising from the trial court's exercise of discretion on an evidentiary issue should not be reversed simply because the reviewing court would have ruled differently. . . .The trial court's decision on a close evidentiary question ordinarily cannot be an abuse of discretion." *People v Smith*, 456 Mich 543, 550; 581 NW2d 654 (1998).

IV. JOINDER

Defendant next argues that the trial court violated his due process rights by joining the various cases for trial "where the sheer number of counts and the nature of the charges resulted in unfair prejudice."

> Generally, this Court reviews questions of law de novo and factual findings for clear error. The interpretation of a court rule, like matters of statutory interpretation, is a question of law that we review de novo. To determine whether joinder is permissible, a trial court must first find the relevant facts and then must decide whether those facts constitute "related" offenses for which joinder is appropriate. Because this case presents a mixed question of fact and law, it is subject to both a clear error and a de novo standard of review. [*People v Williams*, 483 Mich 226, 231; 769 NW2d 605 (2009) (citations omitted).]

Immediately following the trial court's ruling that 404(b) evidence would be admissible, the prosecutor requested that the trial court consolidate "some of these cases." She explained:

> It's the People's intent to try this case twice for appellate purposes. In case we screw up the first time we have a second crack at it, so to speak. We're asking that [MC] and [ND], which are the first two cases in time be tried together. Of course with all the other evidence, the other three; [TC], [MH] and [AL] be tried separatedly [sic]. That way the jury isn't overburdened by having [to] try to decide guilt on all five cases at the same time. We'd like to do [MC] and [ND] together with the remaining three.

Defense counsel indicated that consolidation "would cause a tremendous amount of confusion with regards to the jury and, with regards to the jury hearing both of these cases. So I would ask this Court to consider, obviously making them individual, and set aside individual cases." The trial court responded that trying the case five times was "not fine with me." "We will do the [MC] and [ND] case first. And then we will see what happens with that and make a decision as to the remaining three."

MCR 6.120 provides, in relevant part:

> (B) Postcharging Permissive Joinder or Severance. On its own initiative, the motion of a party, or the stipulation of all parties, except as provided in subrule (C), the court may join offenses charged in two or more informations or indictments against a single defendant, or sever offenses charged in a single information or indictment against a single defendant, when appropriate to promote fairness to the parties and a fair determination of the defendant's guilt or innocence of each offense.
>
> (1) Joinder is appropriate if the offenses are related. For purposes of this rule, offenses are related if they are based on
>
> (a) the same conduct or transaction, or
>
> (b) a series of connected acts, or
>
> (c) a series of acts constituting parts of a single scheme or plan.
>
> (2) Other relevant factors include the timeliness of the motion, the drain on the parties' resources, the potential for confusion or prejudice stemming from either the number of charges or the complexity or nature of the evidence, the potential for harassment, the convenience of witnesses, and the parties' readiness for trial.
>
> (C) Right of Severance; Unrelated Offenses. On the defendant's motion, the court must sever for separate trials offenses that are not related as defined in subrule (B)(1).

"There is a strong policy favoring joint trials in the interest of justice, judicial economy, and administration, and a defendant does not have an absolute right to a separate trial." *People v*

Etheridge, 196 Mich App 43, 52; 492 NW2d 490 (1992). Additionally, "[t]he admissibility of evidence in other trials is an important consideration because '[j]oinder of ... other crimes cannot prejudice the defendant more than he would have been by the admissibility of the other evidence in a separate trial.'" *Williams*, 483 Mich at 237, quoting *United States v Harris*, 635 F 2d 526, 527 (CA6, 1980).

Here, the charges were "related" as a matter of law under any of the enumerated factors set forth in MCR 6.120(B)(1)(a)-(c). That is, the "same conduct" was at issue in which defendant through "a series of connected acts" "constituting parts of a single scheme or plan," preyed upon young black women on the eastside of Detroit. Over a period of just a few weeks, defendant, brandishing a handgun, attacked five young black women in the early morning hours on the eastside of Detroit. He placed, or attempted to place, the victims into the trunk of his vehicle, admonishing them to keep their heads down. He was successful in placing four of the victims into his trunk. Defendant drove them to a home where he made them undress, covered their eyes, and sexually assaulted them. Defendant explained to each of the victims that their families owed him money and that was why they were being sexually assaulted. The sex acts with all four victims were substantially similar – involving vaginal, anal, and oral penetration, as well as penetration with a foreign object. He washed each of the victims after the assaults. Defendant then placed the victims back into the car and drove them to the same area where he initially confronted them. As previously discussed, defendant's offenses against each of the victims would have been admissible in each case under MRE 404(b) and MCL 768.27 if the cases had been tried separately. Additionally, the factors identified in MCR 6.120(B)(2) also favored joinder of the charges for trial. While defendant complains that the jury was inundated with information about all five victims, the same testimony would have been elicited from all five victims even if there had been five separate trials. Accordingly, the trial court did not err in joining the cases for trial.

V. JUDICIAL BIAS

In Docket Nos. 30012 and 300264, defendant argues that the judge's comments deprived him of his right to a fair and impartial trial and that defense counsel was ineffective for failing to move for a mistrial.

"Because defendant did not raise any claim of judicial bias in the trial court, this issue is not preserved. Therefore, we review this issue for plain error affecting defendant's substantial rights." *People v Jackson*, 292 Mich App 583, 597; 808 NW2d 541 (2011) citing *People v Carines*, 460 Mich 750; 597 NW2d 130 (1999). "In assessing the propriety of a judge's actions we review the record de novo." *In re Hocking*, 451 Mich 1, 5 n 8; 546 NW2d 234 (1996).

To the extent defendant claims that his attorney was ineffective for failing to move for a mistrial, this Court reviews de novo whether a defendant was deprived of his constitutional right to effective assistance counsel. *People v Gardner*, 482 Mich 41, 46; 753 NW2d 78 (2008).

Because no *Ginther*[3] hearing was held, this Court's review is limited to the facts contained on the record. *People v Jordan*, 275 Mich App 659, 667; 739 NW2d 706 (2007).

A criminal defendant is entitled to a neutral and detached magistrate. *People v Jackson*, 292 Mich App 583, 597; 808 NW2d 541 (2011) (internal quotations omitted). A criminal defendant "claiming judicial bias must overcome a heavy presumption of judicial impartiality." *Id.* at 598.

> Michigan case law provides that a trial judge has wide discretion and power in matters of trial conduct. This power, however, is not unlimited. If the trial court's conduct pierces the veil of judicial impartiality, a defendant's conviction must be reversed. The appropriate test to determine whether the trial court's comments or conduct pierced the veil of judicial impartiality is whether the trial court's conduct or comments were of such a nature as to unduly influence the jury and thereby deprive the appellant of his right to a fair and impartial trial. [*Id.* (internal quotations omitted).]

During MC's cross examination, the following took place:

> THE WITNESS: Excuse me?
>
> THE COURT: Yes.
>
> THE WITNESS: Could I just say that I don't feel comfortable with him looking at me like that.
>
> THE COURT: Okay. I, I don't know how he's looking at you, but if there's any kind of threats or any kind of intimidating, then, obviously, don't do that. Now he, he's got a right, under the law what's called a right of confrontation; that's where he has the right to confront the people who are accusing against him. But he understands that he can't make threatening gestures or looking at you in any kind of threatening way, all right?
>
> MS. REED [defense counsel]: You Honor, for the record, from where I stand, my client makes no, has no expression on his face at all, he's just sitting in court.
>
> THE WITNESS: No, I didn't say that he made a facial expression, I'm just –
>
> THE COURT: You're just uncomfortable with him looking at you –
>
> THE WITNESS: Yes.

[3] *People v Ginther*, 390 Mich 436, 212 NW 2d 922 (1973).

THE COURT: -- is that it? Yeah. Okay. Well, unfortunately he does have the right to be here and has the right to watch you during your testimony so, you're just going to have to do the best job you can, Ms. Carr, okay?

MS. REED: It's just part of our system, the right to confrontation and –

THE COURT: Right.

The trial judge's comments cannot be reasonably construed as commenting on defendant's guilt or "wasting the court's time, and needlessly forcing the complainants to testify and relive the incidents," as defendant claims. Instead, the trial court expressed its sympathy with the witness's discomfort, but explained that her discomfort did not outweigh defendant's constitutional right to confront the witnesses against him. The trial court judge's use of the word "unfortunately" cannot be read as a comment that the judge found it unfortunate that defendant had the right to be present; rather, the term was used in reference to the witness's perspective. The judge's comments were not of such a nature as to unduly influence the jury and thereby deprive defendant of his right to a fair and impartial trial and "[f]ailing to advance a meritless argument or raise a futile objection does not constitute ineffective assistance of counsel." *People v Ericksen*, 288 Mich App 192, 201; 793 NW2d 120 (2010).

VI. RIGHT TO PRESENT A DEFENSE

Defendant next argues that he was denied the right to present a defense when the trial court refused to allow defense counsel to call a rebuttal witness.

"We review for an abuse of discretion a preserved challenge to the admission of evidence. A trial court abuses its discretion when it chooses an outcome that is outside the range of reasonable and principled outcomes." *People v Douglas*, 296 Mich App 186, 191; 817 NW2d 640 (2012). Whether a defendant's right to present a defense was violated by the exclusion of evidence is a constitutional question subject to review de novo. *People v Kurr*, 253 Mich App 317, 327; 654 NW2d 651 (2002).

At the first trial, defense counsel called Christine Merrill as part of its case. Merrill testified that she was the victim of a sexual assault in 2007. Officer Ortiz was the officer-in-charge of the case. He asked Merrill to view a photo array, but she was unable to identify anyone. Merrill denied meeting with Ortiz prior to looking at the array. "I seen him as I was coming in" and "[h]e did tell me that they had someone in custody, but he didn't know if it was the suspect from my incident." He did not tell Merrill who he thought was the suspect. Defense counsel asked the following questions:

Q. Ms. Merrill, did you meet on November 16th, 2009 with Prosecutor Povilaitis?

A. Yes.

Q. And it was concerning an unrelated matter of judiciary committee testimony of some kind?

A. Yes.

Q. And at the conclusion of that interview, did you say and speak with Ms. Povilaitis?

A. Yes.

Q. And did you tell Ms. Povilaitis at that time how glad you were to have Officer Jose Ortiz on your case?

A. It wasn't exactly like that. We were just having –

Q. Just – did you tell her --

A. No.

Q. that you were glad to have Jose Ortiz on your case?

A. No.

Q. Did you tell her that you didn't actually see the Defendant's face during the rape?

A. No, I did not.

Q. Did you tell her that you didn't get a good enough look at him to identify him?

A. No. I – no.

Q. Did you tell her that on about three occasions Officer Ortiz had shown you lineups and you were not able to identify your attacker?

A. No, ma'am.

Q. Did you tell her that at the last lineup you arranged to meet Officer Ortiz earlier at another location?

A. No.

Q. Did you tell her that you actually met Officer Ortiz at another location prior to the lineup?

A. No.

Q. Did you tell her that Officer Ortiz told you that he was sure it was one person in the lineup and pointed that person out to you?

A. No.

Q. Did you tell her that even after looking at the photographs in the lineup you still didn't recognize the attacker's face, but you picked a person because Officer Ortiz told you that he was the likely person?

A. No.

Q. You didn't tell her any of that?

A. No. [Tr VI, pp 8-10.]

Defense counsel wanted to call Povilaitis as a witness to rebut Merrill's testimony:

> to at least make it a question of fact for the jury, that this witness is lying and that Officer Ortiz in another case – again, when we talk about similar acts, motive, plan, scheme, of Officer Ortiz to railroad Defendants. This witness, with Povilaitis shows his plan or scheme to railroad Defendants. And in this case it's Mr. Anthony. In the other case it was another Defendant two years ago. But it shows a plan or scheme by the police and along with the prosecutor's office to railroad Defendants. And I believe that a jury has a right to know that.

The prosecutor objected, arguing that such testimony would be "impeachment upon impeachment" and a collateral issue. The trial court agreed:

> The problem is that the statements that she gave Ms. Povilaitis were not under oath. She's testified under oath on several different occasions and each time she's testified under oath those statements have been consistent. I can't begin to tell you why she may have said something different to Ms. Povilaitis, but the fact is that when she's been in a position where she's provided sworn testimony, her testimony was consistent. I find that to have Ms. Povilaitis come and testify would in fact be impeachment upon impeachment and I don't feel it's allowable under these circumstances and I'm going to deny the defense motion with respect to calling Ms. Povilaitis as a witness at this time.

At the start of the second trial and while defendant was acting as his own attorney, he indicated his desire to call Povilaitis. The following discussion took place:

> THE DEFENDANT: She going to testify to the fact that the witness, well she's not a witness in this case. But Christine Merrill had, she had a conversation with Christine Merrill. And Christine Merrill had disclosed some information to her about Detective Ortiz. And the fact that he told someone in her case, in a case that she, I guess she was prosecuting at the time that, told the witness to pick this person out in the lineup.
>
> And the same thing Christine Merrill stated in her statement is the exact same thing that, I think it was [MC] said in her testimony. Testimony is almost the exact same thing from what I see in the statement from Christine Merrill.

> MS. HAGAMAN-CLARK: We would object to that based on the defendant's offer of proof. What he intends to put on is nothing more than hearsay. I mean to have her testify about a conversation that she had with somebody else, and that is hearsay.
>
> THE COURT: All right. I agree. And I've made a similar ruling in the first time that we tried this matter. And I am not, at this point, going to allow the testimony of Miss Povilaitis.

At the second trial, Merrill testified exactly as she did in the prior trial. She was the victim of a sexual assault in 2007 and Ortiz was the officer-in-charge of the case. Merrill viewed several photo arrays. She denied meeting privately with Ortiz and also denied that Ortiz told her whom to choose from the arrays. Merrill denied telling prosecutor Povilaitis that she was really glad that Ortiz had been on her case because, even though she did not see the perpetrator's face, Ortiz told her whom to pick out. At the second trial, unlike the first, Merrill was asked about speaking to a Detective Bivens about the identification she made during her case. On re-direct examination, Merrill was presented with a statement she made to Bivens, in which she told Bivens that Ortiz told her to focus on "Number 6" at the photo show-up. The prosecutor on re-cross examination presented Merrill with the photo array at issue. The man convicted of attacking Merrill was Deondre Mullins, who was in position "Number 4," not 6.

Once again, defense counsel indicated her desire to call assistant prosecutor Povilaitis to impeach Merrill's testimony. The prosecutor objected again on the grounds that "it's impeachment upon impeachment of a collateral issue." The trial court agreed with the prosecutor: "The court's ruling is that it is impeachment upon impeachment and that the testimony from Ms. Merrill has been set forth as she's taken a position here under oath, and I am therefore ruling against the defense request to call Assistant Prosecutor Povilaitis."

We conclude that the trial court did not abuse its discretion when it refused to allow defendant to call Povilaitis at either trial. "The credibility of a witness may be attacked by any party, including the party calling the witness." MRE 607. A witness' prior inconsistent statement is admissible if the witness has the opportunity to explain or deny the statement. MRE 613(b). "However, the admissibility of extrinsic evidence of a prior inconsistent statement is limited by the collateral matter rule . . ." *People v Carne*r, 117 Mich App 560, 571; 324 NW2d 78 (1982), and "extrinsic evidence may not be used to impeach a witness on a collateral matter . . .even if the extrinsic evidence constitutes a prior inconsistent statement of the witness, otherwise admissible under MRE 613(b)," *Barnett v Hidalgo*, 478 Mich 151, 165; 732 NW2d 472 (2007). "We have long adhered to the familiar rule that a witness may not be impeached by producing extrinsic evidence of collateral facts." *People v Teague*, 411 Mich 562, 566; 309 NW2d 530 (1981).

A matter is "collateral" when it is "neither 'relevant to the substantive issues in the case' nor 'independently provable by extrinsic evidence, apart from the contradiction, to impeach or disqualify the witness.'" *Id.* citing McCormick on Evidence (2d ed.), s 47, p. 99; s 36, pp. 70-71.

> [T]here are three kinds of facts that are not considered to be collateral. The first consists of facts directly relevant to the substantive issues in the case. The second

> consists of facts showing bias, interest, conviction of crime and want of capacity or opportunity for knowledge. The third consists of any part of the witness's account of the background and circumstances of a material transaction which as a matter of human experience he would not have been mistaken about if his story were true. [*People v Guy*, 121 Mich App 592, 604; 329 NW2d 435 (1982).]

"If the [party seeking to use a witness' prior inconsistent statement] would be entitled to go into the matter in its case-in-chief, the matter is not collateral." *Carner*, 117 Mich App at 571. Additionally, Black's Law Dictionary defines "collateral issue" as "[a] question or issue not directly connected with the matter in dispute;" a "collateral fact" is "[a] fact not directly connected to the issue in dispute, esp. because it involves a different transaction from the one at issue." Black's Law Dictionary (9th ed) pp 669, 907.

It is obvious from the record that defendant sought to use Povilaitis to impeach Merrill on a collateral matter. Defendant would not have been able to question Povilaitis about Merrill's out-of-court statement in its case in chief because it constituted inadmissible hearsay. "'Hearsay' is a statement, other than the one made by the declarant while testifying at the trial or hearing, offered in evidence to prove the truth of the matter asserted." MRE 801(c). "Hearsay is not admissible except as provided by these rules." MRE 802. Defendant would have used Merrill's out-of-court statements to prove the truth of the matter asserted – that Ortiz told her which suspect to choose from the photo array. The statements did not fall into any of the exclusions or exceptions. MRE 803 and MRE 804. Additionally, Ortiz's alleged conduct as it pertained to Merrill's case was not directly connected to the dispute; it involved a different transaction. Defendant was not precluded from proceeding with that theory, but could not do so by impeaching Merrill on a collateral matter.

It follows that defendant was not denied the right to present a complete defense:

> There is no doubt that based on the Fourteenth Amendment's Due Process Clause and the Sixth Amendment's Compulsory Process or Confrontation Clauses, the Constitution guarantees criminal defendants a meaningful opportunity to present a complete defense. Few rights are more fundamental than that of an accused to present evidence in his own defense. But this right is not unlimited and is subject to reasonable restrictions. The right to present a complete defense may, in appropriate cases, bow to accommodate other legitimate interests in the criminal trial process. Michigan, like other states, has a legitimate interest in promulgating and implementing its own rules concerning the conduct of trials. And our Supreme Court has broad latitude under the Constitution to establish rules excluding evidence from criminal trials. Thus, an accused must still comply with established rules of procedure and evidence designed to assure both fairness and reliability in the ascertainment of guilt and innocence. The Michigan Rules of Evidence do not infringe on a defendant's constitutional right to present a defense unless they are arbitrary or disproportionate to the purposes they are designed to serve. [*People v King*, 297 Mich App 465, 473-474; 824 NW2d 258 (2012) (internal citations and quotations omitted).]

Defendant does not argue that the rules of evidence are arbitrary or disproportionate to the purposes they are designed to serve. Accordingly, he was not denied the right to present a defense.

VII. WAIVER OF RIGHT TO COUNSEL

In Docket Nos. 308204, 308205 and 308212, defendant argues that the trial court failed to comply with the court rules and obtain defendant's knowing waiver of the right to counsel during pretrial hearings and jury selection in the second trial.

"When assessing the validity of a defendant's waiver of the right to counsel, we review de novo the entire record to determine whether the trial court's factual findings regarding the waiver were clearly erroneous. To the extent that a ruling involves an interpretation of the law or the application of a constitutional standard to uncontested facts, our review is de novo." *People v Willing*, 267 Mich App 208, 218-219; 704 NW 2d 472 (2005) (internal quotations omitted).

While "[t]he Sixth Amendment safeguards the right to counsel at all critical stages of the criminal process for an accused who faces incarceration . . . The United States Constitution does not . . .force a lawyer upon a defendant" and "a criminal defendant may choose to waive representation and represent himself." *People v Williams*, 470 Mich 634, 641; 683 NW2d 597 (2004). However, before granting a defendant's request for waiver of the right to counsel, a trial court must ensure that the waiver is knowing, intelligent, and voluntary. *Id.* at 642.

> First, the waiver request must be unequivocal. Second, the trial court must be satisfied that the waiver is knowingly, intelligently, and voluntarily made. To this end, the trial court should inform the defendant of potential risks. Third, the trial court must be satisfied that the defendant will not disrupt, unduly inconvenience, and burden the court or the administration of court business. [*Id*.]

Furthermore, MCR 6.005(D)(1) prohibits a court from granting a defendant's waiver request without first advising the defendant of the charge, the maximum sentence, any mandatory minimum sentence, and the risks of self-representation. Pursuant to MCR 6.005(E), the trial court must advise a defendant of the continuing right to counsel at each subsequent hearing. The trial court must substantially comply with all of these requirements in order for the defendant to validly waive the right to counsel. *Willing*, 267 Mich App at 220.

Prior to the start of defendant's second trial, a hearing was held on a number of issues, including the fact that defendant had filed a grievance against his attorney. The following exchange took place:

> THE COURT: . . .The other thing that you asked for is on the basis of the fact that you filed a grievance against Ms. Reed, that you filed a motion for a new trial based upon ineffective assistance of counsel, you indicated you still wanted to represent yourself, is that still correct, Mr. Anthony?
>
> THE DEFENDANT: Yes, with the assistance of a different counsel.
>
> THE COURT: With assistance of a different counsel?

THE DEFENDANT: Yes.

THE COURT: Well, what do you anticipate requiring of counsel, in terms of assistance, if you're going to be representing yourself?

THE DEFENDANT: You know, I'm not an attorney, nor do I try to practice to be one. I just need an attorney to assist me to make sure my rights are being protected, you know, one that I can trust, I don't think that's working with the prosecution. I think Ms. Reed is working with the prosecution. This is why I wouldn't want Ms. Reed to assist me in no way.

I feel that she was the sole purpose of me getting found guilty at this other trial, the first trial. I mean, they can say DNA linked me or whatever, but I'm, you know, due to the lack of her investigation and everything, I believe that was the reason that I got found guilty, for her not doing what she needed to do to help this trial along.

THE COURT: Yes. And as you know, from what I've already said, I disagree with that.

THE DEFENDANT: Right, I understand.

THE COURT: And so did all of those jurors who found you guilty. And so, notwithstanding your position, I'm going to allow you to represent yourself, but only if Ms. Reed is there to assist you as counsel, because she knows the file inside and out. She knows it better than anyone could. She's already tried the case once. She's got the benefit of all that knowledge.

And bringing in another attorney now, that attorney, I don't care how much time they spend on it, they're never going to have the kind of intimate knowledge of the file, the specifics of the issues related to it, all the history that's gone on with it, that she has. And the only reason I would be willing to allow you to represent yourself, and again, that's subject to me reversing that decision, if I feel that there's tactics that you're using that are meant to thwart the best interest of justice, or to delay the proceedings, because you remember, that was the reason why I told you before that I didn't think that it was appropriate for you to represent yourself, because I found specifically that there were tactics that you were using that I thought were intentionally meant to try and delay and prevent the proceeds from occurring, including the fact that you'd ask for a new attorney no matter who we'd given you to. You were never satisfied with whatever attorney you had. So, I'm going to allow you to represent yourself, as long as everything stays on track. But, it's only going to be if you use Ms. Reed as your assistant, in terms of advice and counsel. And having said that, I'm going to allow your motion, with respect to the DNA testing, if that's how you want to proceed, if you're going to be representing yourself, I'm going to allow you to have a DNA test done to see if it matches and/or it does not match with the DNA that was taken from you before.

THE DEFENDANT: Okay. And, okay.

THE COURT: Okay. Do you want to proceed representing yourself on –

THE DEFENDANT: Yes, I want to proceed representing myself. And I don't think that, even though Ms. Reed knows the case and has been representing me since, I think it's been April –

THE COURT: Right.

THE DEFENDANT: -- of this year, I don't think that my reasons for dismissing this counsel or trying to get another counsel to assist me would be any delay tactic in this trial procedure. It's the whole purpose is that I do not trust the attorney in no way, shape or fashion.

THE COURT: Here's the problem I have, Mr. Anthony. When you say you want to represent yourself, you're telling me, and this is the basis that we have for allowing you to represent yourself, you're telling me, I can do the job I need to do on my own behalf to represent my interest.

I don't agree with that, okay? I'm just going to tell you that right here. I think that a lawyer, and particularly Ms. Reed who knows the case so well, is going to do a better job for you. But, you're insisting to me that you want to represent yourself.

Now, when I allow that, I do it on the basis of having an attorney standing by, just to make sure there are certain things if you want to go over them. But, basically what I'm hearing from you and what the reason would be for allowing you to represent yourself is that you think you can do it yourself. You think you can represent yourself, and that you may only need assistance on some small minor things that you want to ask a lawyer about during the proceedings.

So, if you're going to be feeling like you can represent yourself in that capacity – in other words, I'm not going to give you another lawyer, and then, have you turning to that lawyer every time there's a question asked and conferring on that, because then you'd just have your own lawyer. That lawyer is going to be there on a special as needed basis, not to turn to them every time a question's asked in trial and say, what do you think of that? What do you think of that? Because you [might] as well have that lawyer representing you then.

THE DEFENDANT: And I understand exactly what you're saying, and that's not my purpose, Your Honor. I just feel, as much as I just stated –

THE COURT: Sure. I understand your position, and I'm not going to allow it. I'm going to have Ms. Reed be the standby counsel for the reasons that I've already stated, okay?

Are you going to represent yourself?

THE DEFENDANT: Yes, I'm going to represent myself.

On September 10, 2010, defendant appeared for a buccal swab supervised by the trial court judge. The swab was taken by an employee of a clinic chosen by defendant and independent of the police department. The purpose was to compare the sample with the DNA collected from the previous case. A trial date needed to be set and the trial court waited until standby counsel appeared before proceeding.

A special pretrial was held on September 28, 2010 and standby counsel was present for defendant. The trial court noted:

> THE COURT: This is in relationship to the letter that Mr. Anthony sent me. Do we have the file copy?
>
> I received this from Mr. Anthony September 23, 2010. I provided copies to the prosecution, Miss Hagaman-Clark, and Mr. Anthony's stand by attorney, Miss Reed.
>
> Mr. Anthony started off by indicating that you're not an attorney, nor am I trying to play one. I just feel that no one has done, has done their all to help me prove my innocence. This is the only reason I elected to represent myself in these matters.
>
> First of all, I need to make sure, you still want to represent yourself?
>
> THE DEFENDANT: Yes, Your Honor.
>
> THE COURT: Okay. When I see something that says, 'I'm not an attorney nor am I trying to play one,' it makes me nervous, because I want to make sure that you feel comfortable that you've made the right decision. Because you have the right to have an attorney. When you say 'I'm not an attorney nor am I trying to play one,' it makes me think that maybe you're saying, I'm having second thoughts about his. You are still comfortable representing yourself?
>
> THE DEFENDANT: Yes, I am, Your Honor. And the reason I stated the way I stated that, that's just a rough draft. I didn't mean to send that specific letter there.
>
> THE COURT: Oh.
>
> THE DEFENDANT: I had another. But I was rushing and going a lot of things, and I sent the wrong one. But anyway, being that you got that one –
>
> THE COURT: Right.
>
> THE DEFENDANT: -- I was trying to say basically that, you know, throughout this whole process, you know, I haven't been represented fairly.

THE COURT: All right. Well you and I have a disagreement on that. And I understand your position. That's okay. You have made your position clear. And I've made my position clear to you.

I thought your attorney did an excellent job on your behalf. We just agree to disagree on that.

THE DEFENDANT: Right.

THE COURT: Okay. But you are comfortable now representing yourself and that's the way you want to proceed, right?

THE DEFENDANT: Yes, Your Honor.

A motion hearing was held on October 15, 2010, regarding defendant's request to re-test all the victims' DNA evidence. The trial court explained that, while it previously granted defendant's motion to have his own DNA tested at a facility of his choice, the trial court had not granted any request to re-test the other evidence. The results of defendant's DNA evidence had arrived and the trial court opened it in front of the parties to ensure that defendant would see the original. Defendant again expressed his concern that he did not have all of the relevant evidence in his possession. Standby counsel was enlisted to help defendant get in touch with an investigator.

A special pretrial was held on October 29, 2010, at which time defendant requested a different investigator. Defendant indicated that "my attorney's never had a real understanding of where we was going with this case. Then, that you turned the case over to me, allow me to represent myself. I feel that now, that, you know, things is getting done the way I feel they should go." He asked for an adjournment, which was denied.

A special pretrial was held on November 5, 2010, at which time the parties expressed dismay that the investigator had still not met with defendant. Defendant continued to argue that he had not been provided all discovery. Defendant was going to be given an opportunity to speak with the DNA expert regarding his result, which were consistent with what the prosecution had.

A final motion hearing was held on November 10, 2010, at which time defendant continued to complain that he did not have all discovery he requested. His motion for an adjournment to allow his investigator more time to investigate was denied.

Trial began with jury selection on November 15, 2010. Standby counsel was present. The trial court confirmed:

THE COURT: All right. Good morning. Mr. Anthony, is it still your desire to go forward representing yourself in this matter?

THE DEFENDANT: Yes, Your Honor.

THE COURT: All right. I just want to make sure. I just want to make sure, we've got something on the record that you've given it thorough consideration, and that, that's your desire to go forward at this time.

During jury selection, standby counsel played an active role. Although the trial court exclusively conducted voir dire, there were at least two occasions in which counsel raised issues. The first instance came as it related to possible media coverage of the case:

THE COURT: . . .I'm going to ask you now, have any of you heard media coverage in the paper, the newspaper, on the television or on the Internet of someone called the "Eastside Serial Rapist?" If anyone has heard of any media coverage of someone called the "Eastside Serial Rapist" please raise your hand and identify yourself.

Mr. Niner, what exactly do you remember about hearing about that?

MS REED [standby counsel]: Your Honor, may we approach?

THE COURT: Hang on a second. The concern I think that counsel has is, that if we ask Mr. Niner what he's heard, that that has the potential of contaminating the jury pool with respect to what he's heard.

I'll simply ask the question this way, and I think it's an appropriate concern that's been raised, has what you've heard, Mr. Niner, created any concern on your part that maybe you feel you couldn't be fair and impartial in this case?

The second involved the inability of a potential juror to hear what was happening. This was again brought to the attention of the court by Ms. Reed, defendant's standby counsel.

On the second day of trial on November 16, 2010, the trial court indicated that juror number two had called in ill. The trial court did not confirm that defendant wished to continue with self-representation, but there was nothing substantive discussed. All parties agreed to adjourn to the following day with hopes that the juror would be better.

Trial resumed on November 18, 2010. The trial court noted:

THE COURT: . . .All right. As everyone knows, we've discussed that Ms. Reed received a letter from Mr. Anthony. It's actually stating the same thing, that Mr. Anthony has taken considerable time and thought and consideration of the situation that's in front of him, and believes that it is in his best interest that he not represent himself. And that he have Ms. Reed, as he indicates in the letter to me, he puts in quotes, "who is an attorney", step in and do the job that he thought initially that he could do.

He states further in this letter:

"I'll admit, Your Honor, that this is more than I anticipated it to be. So, what I'm saying is that I'm not an attorney, I don't know the law. And I

know that me representing myself in matters like these would not be in the best interest in protecting my rights."

Is that still how you feel, Mr. Anthony?

THE DEFENDANT: Yes, Your Honor.

THE COURT: Okay. And as you know, I agree with you. I've tried to talk you out of representing yourself before. It was your right to go ahead and try it. And so, I'm certainly not going to oppose that, and I am, at this time, going to remove Mr. Anthony from representing himself. State for the record that, in fact, Ms. Reed is going to be his counsel of record at this time.

Defendant's request to represent himself was unequivocal and the trial court substantially complied with its obligations under MCR 6.005 and *Williams*. The trial court took great pains to determine on the record that defendant's waiver was knowing, intelligent, and voluntary. Although the trial court may not have specifically advised defendant of the charges and potential term of incarceration, defendant has already been sentenced to multiple life sentences in the prior trial and was obviously well-aware of what lay before him. Additionally, the trial court informed defendant of the potential risks of self-representation, and was satisfied that defendant would not disrupt, unduly inconvenience, or burden the court. Moreover, the trial court continuously advised defendant of his continuing right to counsel. Defendant's appeal on this issue lacks merit.

VIII. LIFETIME ELECTRONIC MONITORING

Defendant next argues that the trial court improperly sentenced him to lifetime electronic monitoring.

"'Whether defendant is subject to the statutory requirement of lifetime electronic monitoring involves statutory construction, which is reviewed de novo.'" *People v Brantley*, 296 Mich App 546; 823 NW2d 290 (2012), quoting *People v Kern*, 288 Mich App 513, 516; 794 NW2d 362 (2010).

In the context of first-degree CSC, MCL 750.520b(2)(d) provides that "[i]n addition to any other penalty imposed under subdivision (a) or (b), the court shall sentence the defendant to lifetime electronic monitoring under section 520n." MCL 750.520n, in turn, provides that: "A person convicted under section 520b or 520c for criminal sexual conduct committed by an individual 17 years old or older against an individual less than 13 years of age shall be sentenced to lifetime electronic monitoring as provided under section 85 of the corrections code of 1953, 1953 PA 232, MCL 791.285." In *Brantley*, the defendant argued that he was not subject to lifetime electronic monitoring because such monitoring applied *only* when the victim was less than 13 years old and the defendant was at least 17 years old. *Brantley*, 296 Mich App at 556. This Court disagreed:

having examined this provision in context and compared it to MCL 750.520c, we conclude that the Legislature intended the modifying phrase "for criminal sexual conduct committed by an individual 17 years old or older against an individual

> less than 13 years of age" to apply to convictions of second-degree criminal sexual conduct (CSC–II) under MCL 750.520c only, and not to convictions of CSC–I under MCL 750.520b.
>
> ***
>
> Accordingly, we read MCL 750.520n(1) as requiring the trial court to impose lifetime electronic monitoring in either of two different circumstances: (1) when any defendant is convicted of CSC–I under MCL 750.520b, and (2) when a defendant who is 17 years old or older is convicted of CSC–II under MCL 750.520c against a victim who is less than 13 years old. In other words, we hold that any defendant convicted of CSC–I under MCL 750.520b, regardless of the age of the defendant or the age of the victim, must be ordered to submit to lifetime electronic monitoring. MCL 750.520b(2)(d); MCL 750.520n(1). [*Id.* at 557-558.]

To the extent defendant seeks to preserve the issue for the Supreme Court, it should be noted that the Supreme Court has denied leave to hear the case.[4] Lifetime electronic monitoring is required for defendants convicted of first-degree CSC.

However, defendant was not convicted of *any* CSC as to AL. Accordingly, the matter should be remanded for the ministerial task of correcting the judgment of sentence in case 09-019855-FC.

IX. CONSECUTIVE SENTENCING

Defendant next argues that the trial court improperly imposed consecutive sentences as to each victim's case.

This Court reviews de novo whether consecutive sentences may be imposed. *People v Gonzalez*, 256 Mich App 212, 229, 663 NW2d 499 (2003).

"A consecutive sentence may be imposed only if specifically authorized by statute." *People v Brown*, 220 Mich App 680, 682; 560 NW2d 80 (1996).

MCL 750.520b(3) provides that "[t]he court may order a term of imprisonment imposed under this section to be served consecutively to any term of imprisonment imposed for any other criminal offense arising from the same transaction."

Defendant cites *People v Bekele*, unpublished opinion per curiam of the Court of Appeals, issued February 17, 2011 (Docket No. 294592) slip op p 6 (footnote omitted), for the idea that the trial court lacked authority to order consecutive sentences.[5] In *Bekele*, the defendant

[4] *People v Brantley*, 493 Mich 877 (2012).

[5] The case is unpublished and has no precedential value. MCR 7.215(C)(1).

was convicted of three counts of first-degree CSC, and three counts of second-degree CSC 2 and sentenced to 25 to 50 years' imprisonment on each count of CSC 1, to be served consecutively to each other, and to 86 to 180 months' imprisonment for each of the CSC 2 counts, to be served concurrently, which effectively resulted in a 75-year minimum sentence. *Bekele*, slip op p 1. After addressing the merits of the defendant's appeal, our Court sua sponte raised a sentencing issue. *Id.* at slip op 6. Citing MCL 750.520b(3), this Court concluded:

> We read this provision as simply applying to situations in which a defendant commits a CSC 1 and additionally commits another criminal offense during the same transaction, thereby allowing the court to impose a CSC 1 sentence consecutive to the sentence for the other criminal offense. MCL 750.520b(3) was not intended to allow consecutive sentencing on multiple counts of the offense of CSC 1, where the counts concern separate acts of CSC 1 occurring on different occasions and therefore are not part of the same transaction. [*Id.* at slip op p 6 (footnote omitted).]

In *People v Ryan*, 295 Mich App 388; 819 NW2d 55 (2012), the defendant was convicted of seven counts of CSC 1 and was sentenced to 25 to 50 years' imprisonment for each of the seven CSC–1 convictions, with most of the sentences be served concurrently, except for the sentence on count 9 (fellatio), which was to be served consecutively to the sentence on count 3 (vaginal intercourse). *Id.* at 391 The trial court found that the sexual penetrations associated with those counts arose out of the same transaction and that imposition of consecutive sentences was thus permissible under MCL 750.520b(3), effectively resulting in a minimum prison term of 50 years. *Id.* On appeal, the defendant argued that the phrase "any other criminal offense" in MCL 750.520b(3) was ambiguous and that use of the phrase "necessarily reflects the Legislature's intent to encompass offenses other than the offense covered by the statute that provides for the consecutive sentencing" and "was intended to allow for consecutive sentences only when the 'other criminal offense' was not CSC 1 but was a different offense altogether." *Ryan*, 295 Mich App 399-400. This Court disagreed:

> A fair import of the language in MCL 750.520b(3) is that the trial court had the discretion to impose a term of imprisonment for defendant's act of engaging in vaginal intercourse with the victim—CSC–1, count 9—to be served consecutively to the term of imprisonment imposed for defendant's act of engaging in fellatio with the victim—CSC–1, count 3—as count 3 was a different or distinct criminal offense, given that it was not the same act as the act of vaginal intercourse that formed the basis of count 9. While the two counts are both CSC–1 offenses, they are distinct in the sense that they pertained to different acts of sexual penetration and could independently support imposition of a term of imprisonment; they stand on their own as criminal offenses. Count 3 constitutes "any other criminal offense" when viewed in relationship to, or in conjunction with, count 9. The Legislature's use of the word "any" is all-encompassing and does not permit us to exclude from consideration other CSC–1 offenses upon which a term of imprisonment was imposed. [*Id.* at 406.]

The Court went on to note the purpose of consecutive sentences:

> The purpose of consecutive-sentencing statutes is to deter persons from committing multiple crimes by removing the security of concurrent sentencing. . . . We find it undeniable that the Legislature, by adding MCL 750.520b(3), intended to empower sentencing courts by authorizing the imposition of lengthy prison terms by way of consecutive sentencing when a defendant committed a non–CSC–1 criminal offense and chose to additionally commit a CSC–1 offense during the same transaction. The Legislature intended to remove the security of concurrent sentencing and provide for real and substantial consequences as part of an effort to deter the commission of CSC–1 in transactions involving the commission of non–CSC–1 offenses. We see no reason for concluding that the Legislature did not intend to extend this goal to cases in which multiple CSC–1 offenses are committed during the same transaction. For example, if a defendant sexually victimized two persons in the same transaction, the defendant would likely face a sentence comparable to a sentence for sexually assaulting only one victim absent the prospect of consecutive sentences. Even when there is only one victim, a multiplicity of sexual penetrations in a single transaction would typically heighten the level of egregiousness associated with the defendant's conduct, but the additional conduct or penetrations would effectively be protected by the security of concurrent sentencing if consecutive sentencing were prohibited. [*Id.* at 408-409; 819 NW2d 55 (2012).]

In accordance with *Ryan*, multiple sexual assaults committed during the same incident are subject to consecutive sentencing, but sexual assaults committed on different occasions do not arise from the same transaction and are not subject to consecutive sentencing.

> While it may be argued that a defendant who commits a great number of CSC–1 offenses against a single victim all in separate transactions over time is more deserving of consecutive sentencing than, for example, a defendant who commits two or more penetrations against a victim in the same transaction, MCL 750.520b(3) provides a sentencing court with the discretion to not employ consecutive sentencing if not appropriate under the circumstances. Moreover, it is not for us to determine who is more deserving of a consecutive sentence relative to the enactment of sentencing statutes and general policy; that is the Legislature's arena. [*Id.* at 409.]

The prosecution concedes that reading *Bekele* and *Ryan* together compels the conclusion that the trial court lacked the statutory authority to order defendant's sentences in each case to run consecutively to the other cases. Accordingly, the trial court erred in ordering consecutive sentences as to each of the five victims.

Additionally, defendant is correct that the jury did not convict him of aggravated assault as to AL. The jury was instructed on aggravated assault as a lesser included offense of assault with intent to commit great bodily harm less than murder. The verdict form reveals that the jury chose to convict defendant of the greater offense. The trial court erroneously sentenced defendant for both assault with intent to commit great bodily harm less than murder and aggravated assault. Therefore, the matter must be remanded to vacate defendant's conviction for aggravated assault.

X. CRIME VICTIMS FUND ASSESSMENT

Finally, in Docket Nos. 308204, 308205, and 308212, defendant argues that the trial court violated the ex post facto clauses of both the federal and Michigan constitutions by imposing $130 in fees under the Crime Victim's Rights Act (CVRA), MCL 780.751 et seq.

This Court reviews de novo claimed ex post facto violations. See *People v Callon*, 256 Mich App 312, 315; 662 NW2d 501 (2003).

This Court has recently held that "while it is true that restitution is a form of punishment such that any newly authorized form of restitution may amount to an increase in the defendant's punishment, an assessment under the CVRA is neither restitution nor punishment." *People v Earl*, 297 Mich App 104, 113; 822 NW2d 271 (2012) lv gtd ___ Mich ___; 828 NW2d 359 (2013). Because the fee is not restitution, is not punitive in nature, and does not affect a matter of substance, the trial court's order that defendant pay the increased $130 under the CVRA is not a violation of the ex post facto constitutional clauses. *Id.* at 114.

Defendant's convictions are affirmed. The matter is remanded to the trial court for resentencing. We do not retain jurisdiction.

/s/ Kirsten Frank Kelly
/s/ Douglas B. Shapiro
/s/ Amy Ronayne Krause